

1 ANDRÉ BIROTTE JR.
United States Attorney
2 ROBERT E. DUGDALE
Assistant United States Attorney
3 Chief, Criminal Division
BRANDON D. FOX (Cal. Bar No. 290409)
4 Deputy Chief Public Corruption and Civil Rights
LIZABETH ANN RHODES (Cal. Bar. No. 155299)
5 MARGARET L. CARTER (Cal. Bar No. 220637)
Assistant United States Attorney
6 Public Corruption and Civil Rights Section
1300 United States Courthouse
7 312 North Spring Street
Los Angeles, California 90012
8 Telephone: (213) 894-0284/3541/7413
Facsimile: (213) 894-6436
9 E-mail: Brandon.Fox@usdoj.gov
Lizabeth.Rhodes@usdoj.gov
10 Maggie.Carter@usdoj.gov

11 Attorneys for Plaintiff
12 UNITED STATES OF AMERICA

13 UNITED STATES DISTRICT COURT

14 FOR THE CENTRAL DISTRICT OF CALIFORNIA

15 UNITED STATES OF AMERICA,
16 Plaintiff,
17 v.
18 GREGORY THOMPSON, et al.,
19 Defendants.

No. CR 13-0819-PA

GOVERNMENT'S RESPONSE TO PUBLIC
AUTHORITY AND ENTRAPMENT BY
ESTOPPEL DEFENSES, REQUEST FOR
WITNESS DISCLOSURE, and OBJECTION
AS A MATTER OF LAW; MEMORANDUM OF
POINTS AND AUTHORITIES

Motions

Hearing Date: April 14, 2014
Hearing Time: 3:00 p.m.

Trial Date: May 13, 2014
Trial Time: 8:30 a.m.

24 Plaintiff, United States of America, by and through its counsel
25 of record, the United States Attorney for the Central District of
26 California and Assistant United States Attorneys Brandon D. Fox,
27 Lizabeth A. Rhodes, and Margaret L. Carter, hereby responds pursuant
28 to Federal Rule of Criminal Procedure 12.3 to the Notices of Public

Authority Defense provided by the following defendants on the following dates:

Defendant	Docket No.	Filing Date
Gregory Thompson	121 & 123	03/15/2014
Stephen Leavins	131 & 173	03/17/2014
Gerard Smith	129	03/17/2014
Mickey Manzo	135	03/17/2014
James Sexton	138 (Application to File Under Seal)	03/17/2014
Scott Craig	120 & 175	03/14/2014
Maricela Long	128	03/16/2014

Pursuant to Rule 12.3(a)(3), the government denies that any of the defendants exercised public authority as identified in the notices. Moreover, as described in greater detail in the attached memorandum of points and authorities, the noticed public authority and entrapment by estoppel defenses fail as a matter of law because no agent of the Los Angeles Sheriff's Department may authorize an individual to commit a federal crime.

Pursuant to Rule 12.3(a)(4)(A), the government also requests that the below-listed defendants each disclose the name, address, and telephone number of each witness upon which that defendant intends to rely to establish the public authority defense listed in each defendant's notice:

Defendant	Docket No.	Filing Date
Gregory Thompson	121 & 123	03/15/2014
Stephen Leavins	131 & 173	03/17/2014
James Sexton	138 (Application to File Under Seal)	03/17/2014
Scott Craig	120 & 175	03/14/2014
Maricela Long	128	03/16/2014

The government also requests that defendant James Sexton specifically note in his witness disclosures which witness, if any, he intends to rely on to establish his claim that he was acting on behalf of Steven M. Martinez of the Federal Bureau of Investigation. This is necessary to provide the government with adequate notice of defendant

1 Sexton's defense pursuant to Rule 12.3, since Steven Martinez is the
 2 only federal official identified in any of the notices; all of the
 3 other claimed defenses are legally deficient.

4 Accordingly, the government also objects to the introduction by
 5 any of the above-listed defendants of any evidence and argument
 6 supporting the public authority or entrapment by estoppel defenses on
 7 the grounds that each one fails as a matter of law because it is
 8 premised on claims that local authorities authorized violations of
 9 federal law. The government also objects to any late disclosures of
 10 additional agencies or any agents not specifically identified in a
 11 defendant's Rule 12.3 notice, including the following non-specific
 12 text in the previously-filed notices:

Defendant	Text
Stephen Leavins	". . . . any other law enforcement agency that may be subsequently disclosed in on-going discovery production" (Docket Nos. 131 & 173.)
James Sexton	". . . . including but not limited to" (Docket No. 138.)
Scott Craig	"Other members of the L.A.S.D. presently not identified." (Docket Nos. 121 & 175.)
Maricela Long	"Other members of the L.A.S.D. presently not identified." (Docket No. 128.)

19 The government notes that defendants Thompson, Smith, and Sexton
 20 object to the form of this response and objection, and request an
 21 opportunity to be heard on the issues raised in the government's
 22 filing and the attached memorandum of points and authorities.
 23 Accordingly, the government has in turn represented that it will
 24 continue to meet and confer with defendants regarding the issues
 25 raised herein, and will file a joint motion in limine prior to trial
 26 and after the exchange of all disclosures required by Rule 12.3.

27 The government's response and objection are based upon the
 28 attached memorandum of points and authorities, the files and records

1 in this case, and any other evidence and argument that the Court may
2 wish to consider.

3 Dated: March 27, 2014

Respectfully submitted,

4 ANDRÉ BIROTTE JR.
United States Attorney

5 ROBERT E. DUGDALE
6 Assistant United States Attorney
7 Chief, Criminal Division

8 /s/ Margaret L. Carter
9 Brandon D. Fox
Lizabeth A. Rhodes
10 Margaret L. Carter
Assistant United States Attorneys

11 Attorneys for Plaintiff
12 UNITED STATES OF AMERICA
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF GOVERNMENT'S
OBJECTION AS A MATTER OF LAW**

I. INTRODUCTION

The government objects to and asks the Court to preclude any argument or evidence regarding any public authority or entrapment by estoppel defense based on the notion that any defendant's conduct was authorized by the Los Angeles Sheriff's Department ("LASD") or any employee of the LASD. Such a defense must fail as a matter of law because controlling Ninth Circuit law requires that the agent who supposedly authorized a violation of federal law had the actual authority to do so. Because the LASD is not a federal agency, neither it nor its employees may authorize the violation of federal obstruction of justice and false statement laws.

The government also objects to any evidence related to claims of public authority not specifically disclosed in defendant's previously-filed public authority notices for failure to comply with Federal Rule of Criminal Procedure 12.3. The government's objection includes the non-specific catch-all wording in the public authority notices filed by defendants Stephen Leavins, James Sexton, Scott Craig, and Maricela Long on the grounds that these provide no notice at all to the government and therefore fail to comply with Rule 12.3.

II. ARGUMENT

A. Any defense premised on authorization by the LASD or an LASD employee should be precluded as legally deficient

With just one exception, every notice of public authority or entrapment by estoppel filed thus far in this case lists only the LASD as the authorizing agency and only LASD employees or agents as

1 authorizing agents.¹ (See Docket Nos. 120, 121, 123, 128, 131, 138
2 (document accompanying sealing application), 173 & 175.) Any
3 assertion, however, that a defendant was acting at the direction of
4 another Los Angeles County Sheriff's Department employee is legally
5 insufficient to establish a public authority or entrapment by
6 estoppel defense, because only a federal agent may authorize a
7 violation of federal law.

8 Public authority and entrapment by estoppel are both affirmative
9 defenses. Accordingly, the Court can require a defendant to make a
10 pretrial offer of proof on any such defenses to demonstrate that the
11 evidence in support of those defenses is sufficient as a matter of
12 law to satisfy each defense's essential elements. See United States
13 v. Mack, 164 F.3d 467, 474 (9th Cir. 1999) (defenses of public
14 authority and entrapment by estoppel ruled inadmissible prior to
15 trial); United States v. Brebner, 951 F.2d 1017, 1027 (9th Cir. 1991)
16 (same). Cf. also United States v. Dorrell, 758 F.2d 427, 430-34
17 (9th Cir. 1985) (necessity defense). When a defendant fails to make
18 this prima facie showing, the defendant may be precluded from
19 presenting argument or supporting evidence regarding the defense at
20 trial. See United States v. Schafer, 625 F.3d 629, 637 (9th Cir.
21 2010); United States v. Moreno, 102 F.3d 994, 997 (9th Cir. 1996)
22 (evidence is not relevant if the defendant fails to present a prima
23 facie case of the affirmative defense).

24 As the Ninth Circuit explained in United States v. Burrows, 36
25 F.3d 875 (9th Cir. 1994), to establish a public authority defense, a

27 ¹ Defendant Sexton is the only defendant in this case who has
28 listed any federal official. He lists just one, Steven M. Martinez
of the Federal Bureau of Investigation.

1 defendant must put forth evidence that "he reasonably relied on the
2 authority of a government official to engage him in a covert
3 activity.'" 36 F.3d at 881-82 (quoting United States v. Baptista-
4 Rodriguez, 17 F.3d 1354, 1368 n.18 (11th Cir. 1994)). For entrapment
5 by estoppel, a defendant must put forth evidence that "a government
6 official tells a defendant that certain conduct is legal and the
7 defendant commits what would otherwise be a crime in reasonable
8 reliance on the official's representation.'" Id. (quoting Baptista,
9 17 F.3d at 1368 n.18). For each defense, the defendant's reliance
10 must be both reasonable and sincere. Id. at 862.

11 In interpreting these requirements, the Ninth Circuit has made
12 clear that a defendant must show some evidence that the law
13 enforcement officers who allegedly authorized the illegal activity
14 had the actual legal authority to permit it. See United States v.
15 Matta-Ballesteros, 71 F.3d 754, 770 n. 12, amended by 98 F.3d 1100
16 (9th Cir. 1995); Burrows, 36 F.3d at 881-82 ("The validity of [a
17 public authority] defense depends on whether the government agent in
18 fact had the authority to empower the defendant to perform the acts
19 in question.'" (quoting Baptista, 17 F.3d at 1368 n.18)).
20 Accordingly, the Ninth Circuit has held that to establish a public
21 authority or entrapment by estoppel defense to a violation of federal
22 law, the authorizing agency must be a federal agency. See, e.g.,
23 Mack, 164 F.3d at 474 (finding public authority and entrapment by
24 estoppel defenses based on conversation with local law enforcement
25 officers were "without merit because Mack did not rely on the advice
26 or authority of federal officials or agents") (emphasis in original);
27 United States v. Collins, 61 F.3d 1379, 1385 (9th Cir. 1995)
28 (entrapment by estoppel against a federal statute must have relied on

1 federal official's or agent's erroneous advice, and not that of a
2 state official). See also Matta-Ballesteros, 71 F.3d at 770 n. 12
3 (indicating that where "a CIA agent could not lawfully authorize the
4 violation of the federal drug laws," the public authority defense
5 probably fails as a matter of law).

6 Here, each of the noticed public authority defenses is premised
7 on authorization by an LASD official. Because no LASD employee may
8 authorize anyone to obstruct a federal grand jury investigation or to
9 make false statements to federal agents, any public authority defense
10 in this case must fail as a matter of law. See, e.g., Mack, 164 F.3d
11 at 474; Brebner, 951 F.2d at 1027 ("[I]n asserting an entrapment by
12 estoppel defense to charges of violating federal law, a defendant is
13 required to show reliance either on a federal government official
14 empowered to render the claimed erroneous advice") (citing
15 United States v. Etheridge, 932 F.2d 318, 321 (4th Cir. 1991)
16 (estoppel defense to federal firearms charge rejected because based
17 on advice of state trial judge rather than official of federal
18 government); United States v. Allen, 699 F.2d 453, 458 n. 1 (9th Cir.
19 1982) (entrapment defense based on alleged misrepresentations of
20 state parole officer rejected because no claim that any federal
21 officials induced unlawful act)). Accordingly, the Court should
22 preclude the public authority and entrapment by estoppel defenses
23 asserted in this case as legally insufficient.²

24
25 ² This result is consistent with "Nuremberg defense" cases that
26 illustrate that federal defendants cannot defend their criminal
27 behavior by claiming that they were just "following orders" given by
28 those who likewise may not commit nor authorize the commission of
federal crimes. See, e.g., United States v. Cortes-Caban, 691 F.3d
1, 12 n.13 (1st Cir. 2012) (rejecting defense by four police officers
that they could not be guilty of civil rights crimes because they
(footnote cont'd on next page)

B. Any defense not specifically noticed should be precluded pursuant to Rule 12.3

Federal Rule of Criminal Procedure 12.3(a)(1) requires defendants to file notice of any defense of "actual or believed exercise of public authority on behalf of a law enforcement agency," by the applicable motions deadline, which was March 17, 2014. Rule 12.3(a)(2) requires that notice to specifically identify (A) the agency involved, (B) the agency member on whose behalf the defendant claims to have acted, and (C) the time during which the defendant claims to have acted with public authority. Accordingly, each defendant should be prohibited from belatedly adding any agencies or agents on whose behalf they claim to have exercised authority.

Those defendants who have attempted to include vague placeholders or catch-all provisions in their Rule 12.3 notice should similarly be precluded from later presenting any defense about which they did not specifically give notice. Specifically, the following phrases in the following defendants' notices are each insufficient to provide the government with notice under Rule 12.3:

Defendant	Text
Stephen Leavins	". . . . any other law enforcement agency that may be subsequently disclosed in on-going discovery production" (Docket Nos. 131 & 173.)
James Sexton	". . . . including but not limited to" (Docket No. 138.)
Scott Craig	"Other members of the L.A.S.D. presently not identified." (Docket Nos. 121 & 175.)
Maricela Long	"Other members of the L.A.S.D. presently not identified." (Docket No. 128.)

were just "following orders"); United States v. Hill, 643 F.3d 807, 865 (11th Cir. 2011) (defendant's contention that he was only following orders "is no defense"); United States v. Funmaker, 10 F.3d 1327, 1331 (7th Cir. 1993) ("defendants cannot circumvent federal prosecution by claiming that they were merely following orders.").

1 Because these vague provisions provide no notice at all,
2 defendants should not be permitted to rely upon them later to
3 introduce evidence or argument regarding a public authority or
4 entrapment by estoppel defense. Fed. R. Crim. P. 12.3; see also
5 United States v. Seeright, 978 F.2d 843, 848 (4th Cir. 1992) (holding
6 that testimony of undisclosed defense witnesses regarding public
7 authority defense was not an abuse of discretion where defendant
8 failed to timely disclose names of specific witnesses). Defendants
9 should accordingly be precluded from presenting any defense that some
10 agent not specifically named in their respective notices authorized
11 any one of them to commit obstruction of justice and make false
12 statements to the agents of the Federal Bureau of Investigation.

13 **C. Sexton's Steven Martinez Defense**

14 Unlike all the other noticed public authority and entrapment by
15 estoppel defense, which are all based on the legally insufficient
16 claim that defendants' alleged crimes were authorized by the LASD,
17 defendant Sexton does include one federal official his list of
18 government agents – Steven M. Martinez of the Federal Bureau of
19 Investigation ("Martinez"). The government requests that defendant
20 Sexton disclose, pursuant to Federal Rule of Criminal Procedure
21 12.3(a)(4)(A) & (B), all witnesses upon which defendant would rely to
22 establish such a claim. The government currently expects to ask the
23 Court to require an offer of proof of any defense based on Martinez's
24 alleged authorization and to ask the Court to preclude it because the
25 government does not currently believe that defendant Sexton can make
26 a prima facie showing that he relied on any statements or actions of
27 Martinez. Indeed, in his own filing in support of various pretrial
28 motions, defendant Sexton claims that he first "reach[ed] out to the

1 FBI" in 2012, after the events alleged in the indictment and the time
2 period set forth in defendant Sexton's Rule 12.3 notice. (See
3 Unredacted Consolidated Declaration of Nicholas J. Begakis ¶ 5.
4 (filed under seal).)

5 **III. CONCLUSION**

6 For the foregoing reasons, this Court should preclude any
7 evidence and argument regarding public authority or entrapment by
8 estoppel defenses that are based on the authorization of LASD
9 employees on the grounds that they are legally insufficient defenses
10 to the charged crimes. The government will also seek to preclude any
11 defenses that were not specifically noticed as required by
12 Rule 12.3(a)(2). The government reserves its right to object to any
13 defense based on the authorization of Steven M. Martinez until after
14 defendant Sexton provides the government with witness disclosure as
15 required by Rule 12.3(a)(4).

16 Dated: March 27, 2014

Respectfully submitted,

17 ANDRÉ BIROTTE JR.
United States Attorney

18 ROBERT E. DUGDALE
19 Assistant United States Attorney
Chief, Criminal Division

20
21 /s/
MARGARET L. CARTER
22 Assistant United States Attorney

23 Attorneys for Plaintiff
24 UNITED STATES OF AMERICA
25
26
27
28